NATIONAL REGULATION OF RAILROADS

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If I may venture to say anything upon a subject which has nearly exhausted discussion it will be to emphasize one or two points which perhaps have not been sufficiently noted and to outline certain considerations which I regard as fundamental. The agitation for a more efficient control of interstate carriers is the outgrowth of an insistent public sentiment and expresses a determined purpose to correct existing abuses. Since the passage of the act to regulate commerce in 1887, which in many respects was understood to be a tentative and experimental measure, no important change or enlargement of its provisions has been made, except the addition of the excellent Elkins law, although its limited scope and insufficient restraints have long been apparent. Meanwhile the railway mileage has increased upwards of 50 per cent., revenues have more than doubled, numerous lines formerly independent have been merged into great systems or otherwise brought under unified control, and many other conditions have arisen which were not foreseen or taken into account when the original law was enacted. The time has arrived when this scheme of regulation should be carefully revised not only in its substantive features, but also to an extent in its methods of administration.

This does not imply that the present law should be discarded and some new theory of regulation be given a trial. There is little reason to discredit the act of 1887 or warrant the effort to belittle its operation. It is a statute of broad and beneficent aim based upon principles which are concededly wholesome and correct. Indeed, when we remember that the enormous power of the Congress under the commerce clause of the Constitution had lain dormant for nearly a hundred years, when we call to mind the amazing rapidity of railway construction during the two speculative decades that followed the Civil War, when we take into account the conditions which had grown up with that extraordinary development and realize that practices which are now regarded with reprobation were then looked

upon with tolerance and found little condemnation in the average conscience, it is quite remarkable that a law should have been passed which expresses such just rules of conduct and which contains such comprehensive and salutary provisions. It is the part of wisdom, as I believe, not to attempt any radical departure from the principles and purposes of this enactment, but to supply needed legislation for correcting its defects, strengthening its provisions and augmenting its authority.

The Basis of Regulation.

In the statements before the Senate Committee and in current discussions in the press and elsewhere there is, as it appears to me, some confusion of thought and a degree of failure to make proper distinctions. In many quarters it seems to be supposed that the one thing requisite is to increase the powers of the Interstate Commerce Commission; whether that shall be done or not is the chief point of controversy. To my mind that is only one side, and perhaps not the most important side, of this complex and obstinate problem. Without disagreeing at all with those who advocate an enlargement of the commission's authority, for I am in full sympathy with their purposes, it is entirely clear to me that other matters are of equal if not greater consequence. There is much to be considered and decided before we come to the question of administrative power, which is merely the machinery for giving effect to measures of regulation. We must begin by prescribing in the statute law, with as much precision and certainty as the case admits, the rules of conduct which it is the province of administration to apply and enforce. The substantive law must first be made ample and explicit, clear and comprehensive in its definition of legal duty and as exact as may be in its restraints and requirements. The obligations of the railroads to the public, the restrictions which limit their freedom or abridge their privileges, the standards by which the lawfulness of their conduct is to be gauged, must all be found in the regulating statute as the necessary foundation of administrative action. It is one thing to enact a code of laws to be observed by the carrying corporations, it is quite another thing to provide the means for securing conformity to that code and giving effect to its requirements. If the substantive provisions of the

statute are inadequate or defective, if its standards of obligation and duty are insufficient or inexact, the shortcoming cannot be made good by administrative machinery, however elaborate or carefully constructed.

This is the point to which I specially desire to direct attention, because just here is found the explanation, for the most part, of whatever disappointment or failure has attended the effort to give effective operation to the act of 1887. The refusal of the courts to enforce disregarded orders of the commission has shown in practically every instance not that the facts had been incorrectly or unfairly found and reported, but that the ascertained and admitted facts, whatever injustice or wrongdoing they might appear to establish, did not disclose any violation of legal duty. The courts have not affirmed that certain practices condemned by the commission were right and just, and ought to be permitted to continue, they have merely declared that those practices are *not unlawful.* So far from furnishing grounds for questioning the fitness or fairness of the commission, which really is quite beside the mark, these very decisions by exposing defects in the substantive provisions of the statute supply a persuasive argument in favor of its amendment. Had the present law established a different tribunal or relied upon the federal courts to make it effective, the practical result would have been precisely the same.

The distinction here sought to be emphasized is made apparent, at least to my mind, when we take our observation from the correct point of view. Under the commerce clause of the Constitution all legislative power over interstate carriers is vested in the Congress. That power, as was decided by the Supreme Court so far back as 1825, is plenary and exclusive and subject to no limitations except such as are found in the Constitution itself. But the Congress cannot delegate its regulating authority by general or wholesale enactment; to do so would be little more than the declaration of a sentiment. It may legislate as minutely as it chooses; for any practical purpose it must legislate not only on general lines but as specifically as the nature of the case permits as to each and every matter which is made the subject of regulation. It cannot transfer its authority to an administrative body of its own creation, or even to the federal courts, to be exercised at discretion, except within limits and probably within somewhat narrow limits. In that which

is enacted must be found alike the things required and the things forbidden. If the statute itself does not impose a duty or restraint in respect of a particular matter, there can be as to that matter no basis for adjudging that the act complained of is unlawful. In this connection it should be remembered that the common law obligations of interstate carriers, if there be any, are of little value as restraints upon wrongdoing. The misconduct which injures and the practices which work injustice are not *malum per se,* and therefore they can be corrected only by legislative enactment. That is to say, "regulation" in all important and essential respects must be regulation by the Congress. The written law must go to the full extent of prescribing requirements, imposing restraints and fixing limitations, not only in general terms but as specifically as the nature of the particular subject admits; and if the statute is wanting in this regard, if its standards of duty and liability are not ample and plainly defined, the injustice not reached or forbidden because of that defect will go without correction. In a word, the substantial features of any adequate scheme of public control must be incorporated and defined in the provisions of an act of Congress. That which the statute law does not specifically condemn and definitely enjoin, the carrier is legally free to do or omit.

The importance of what has thus been said will perhaps be better understood by pointing out its practical applicaton. The task in hand is to devise a system of regulating laws which, while preserving the benefits of private ownership, shall furnish sufficient control over railway carriers to ensure transportation charges which are reasonable and relatively just. Whatever difference of opinion there may be as to whether rates in general are higher now than they ought to be, or are liable to be excessive in the future if public authority does not amply prevent, there is a unanimous demand that rebates and every sort of private preference shall be done away with, and that rate adjustments as between different localities and articles of traffic shall be free from any unjust discrimination.

Now, to secure the results which all right-minded persons desire in this regard, it is evident that the regulating laws must at the outset require the publication of rates and charges and thereby provide, at least *prima facie* and for the time being, a legal standard of compensation for the service offered. In short, we must begin with providing an open and common rate readily ascertainable by the pub-

lic which measures while it remains in force the lawful charges of the carrier. Obviously, then, so long as observance of the standard rate is obligatory, whether it be established by the carrier's voluntary action, as is now the case, or prescribed in the first instance by public authority, the next problems of regulation are of two distinct and unlike classes. Stated in another way, there are two general but dissimilar things to be accomplished, each involving its peculiar difficulties. It is at once necessary to devise measures for ensuring conformity to the common standard and also to provide means by which the standard itself may be changed or its reasonableness tested. There is a fundamental difference between dealing with a rebate or secret concession of any kind and correcting an established and observed rate which is found to be excessive or relatively unjust. Yet adequate provision must be made for both these things in the statute law, independent of its administration, or the regulating scheme will be incomplete and disappointing. Unless both results are actually secured by substantive enactment, unless favoritism of every sort is prevented on the one hand, and on the other there are efficient means of altering an unreasonable or unjust rate which all shippers are compelled to pay, the public will lack needful protection and the duty of the carrier be incapable of enforcement.

It requires little reflection to perceive that the only efficient mode of dealing with the entire range of offenses which result from departures from the published rate is to place them in the category of criminal misdemeanors. Civil remedies for such wrongdoing are of insignificant value, for they neither afford redress to those who are injured by secret practices nor do they operate with any force to prevent the recurrence of similar misconduct. On the other hand, the appropriate means for bringing about the reduction of an unreasonable rate or a change in unjust rate relations preclude the use of criminal penalties. Within the limits of an honest difference of judgment—the limits of actual controversy—the rates established by the carrier and charged to all alike cannot in reason be made the basis of criminal liability, although they may afterwards be adjudged in some degree excessive or unfairly related. For one purpose, therefore, the suitable legislation will differ in essential character from that adapted to the other. To reach one class of offenses we must have penal statutes and criminal courts, to reach the other

class we must have standards of obligation applied and enforced by a civil tribunal. The failure to observe this primary distinction in general and in particular will leave the regulating enactment, however carefully devised and developed, more or less faulty and unworkable. Nor is it enough to recognize these unlike and diverse aims in framing the statute law; it is equally needful that each requirement be met with substantive provisions of comprehensive scope and adequate detail.

Let me illustrate with examples drawn from the act of 1887. And first, a defect in its penal provisions through failure to define, as to a distinct class of dishonest transactions, *an offense that could be proved.* It was undoubtedly intended to provide that a shipper who accepted a rebate should be guilty of a misdemeanor. That certainly ought to be the law. But the courts held, in construing the language of the second section, that it was not enough to show the payment of less than the tariff rate on a given shipment, but that in addition there must be shown the payment of a higher rate by another shipper for a like and contemporaneous service. That is, it was necessary to prove discrimination *in fact* as between the accused and some other shipper before there could be a conviction. As a practical matter this was ordinarily out of the question. For instance, it appeared that dressed beef was carried for a long time and in large quantities from the Missouri River to Chicago at materially less than tariff rates, but it also appeared that the same rate was allowed to all the packers. Although the concessions, or rebates, amounted to thousands and thousands of dollars, there was no actual discrimination as between different shippers, so far as could be ascertained, and therefore in a legal sense no criminal wrongdoing by any of them! Fortunately this loophole through which shippers escaped for years was stopped effectually, as is believed, by the Elkins law which makes the published tariff the legal standard and departure from that standard the punishable offense. But the point to be observed is that gross misconduct could be indulged in with impunity not because of any administrative shortcoming, but solely because the substantive law contained a provoking defect.

To illustrate the other and distinct phase of the subject, reference may be made to the long and short haul question. The charging of a higher rate to a nearer than to a more remote point,

though perhaps not the most serious, is undoubtedly the most aggravating form of discrimination. So obnoxious were tariff adjustments of this sort, so flagrantly wrong in many cases, that the Congress plainly intended to provide a specific remedy in the fourth section of the act to regulate commerce. The greater charge for the lesser distance was therefore prohibited "under substantially similar circumstances and conditions," and a long course of litigation followed over the legal meaning of the quoted phrase. Without reciting the cases in which this question arose, it is sufficient to say, taking the decisions together, that *dissimilarity* exists where competition, not merely of carriers but of markets as well, is present at the more distant place and absent or less forceful at the intermediate place, and that where dissimilarity is found the prohibition does not apply. Now, as a matter of fact, the higher charge for the shorter haul is rarely if ever exacted except on account of some competitive condition at the more distant point not existing at nearer places. It follows, therefore, that the exception to the rule covers practically all the actual cases and leaves the rule itself with little or nothing to act upon. A provision designed to have potent and remedial effect has been construed into a mere abstraction. I do not criticise the decisions of the courts upon this section. As a matter of statutory construction they were doubtless right. Nor is it to my present purpose to argue that the section should be amended and some practical limitation placed upon rate adjustments of this kind. That is for the Congress to determine. But I call attention to the fact that discrimination, however unjust, caused by lower charges for a longer distance—the shorter distance charges being reasonable *per se*—is not now unlawful, and that there must be a substantive change in the statute before there can be any administrative control or restraint upon this class of discriminations. It is primarily the subject of enacted regulation quite apart from the status or authority of the tribunal of administration.

Another example relates to a matter of undoubted importance. The present law in no way abridges the freedom of carriers to determine for themselves in the first instance the rates they shall charge, except the general requirement that such rates shall be reasonable and non-discriminatory, and there is no serious proposal to withdraw or limit their right to initiate such schedules as they may deem proper to establish. It is assumed that carriers will

continue to exercise their own judgment, as they do now, in deciding originally what rates they will publish and apply. This being so, it is apparent that some prescribed notice must be required of proposed changes in published tariffs. If there were no limitations upon the right of carriers to advance or reduce the rates which they have initiated, they could obviously make changes at pleasure which would be little better than not to publish rates at all. The sixth section of the act allows advances to be made on ten days' notice and reductions on three days' notice. This is the only requirement which goes to the stability of rates, a matter which deserves more attention than it sometimes receives. Plainly enough it is now feasible for a traffic manager to make an agreement or have an understanding with a given shipper, in consideration of tonnage secured, to publish a reduced rate at a certain date which may be done easily by giving a notice of three days. The tonnage in question having been obtained at this reduced rate, the carrier may at once give ten days' notice of advance to the previous figure and restore the old rate when that time has expired. The result is equivalent to a secret rebate paid to the shipper of the difference between the two rates. Neither court nor commission can now prevent a transaction of the kind suggested because the method employed is under statutory sanction. In a word, such a discrimination is not unlawful, and therefore cannot be reached or corrected so long as tariffs may be legally changed upon the short notice above stated. Believing that stability of rates is a matter of primary public concern and ought to be secured to a much greater degree than is now the case, I am strongly of the opinion that the required notice of tariff changes should be considerably extended. But my point now is that this is a regulation which pertains to the substantive law and that any injustice which results from authorized changes on such short notice cannot be corrected by strengthening the administrative machinery.

Again, the existing law permits connecting carriers to form through routes and establish joint through rates, which are usually much less than the sum of their local rates, but this they now do by voluntary action and not by virtue of any legal requirement. They are free to make such arrangements and to discontinue them as and when they see fit. The failure or refusal of connecting roads to form through routes and provide through rates sometimes inflicts

manifest hardship, and the fact that such rates cannot be compelled is claimed to discourage the construction of local and branch lines. Inasmuch as mutual service of this sort rests in the option of the carriers, it is not infrequently the case that shippers are obliged to pay full local rates over two or more roads because their managers cannot or do not agree upon lower through rates and their division. It follows that if needful joint service at proper rates is to be secured in such cases, it must be made obligatory in the substantive regulation.

Another instance of what I have in mind suggests a matter of great economic significance, and that is the relation of domestic to export and especially to import rates. It often happens now that traffic is carried from its origin in a foreign country to an interior destination in the United States at a total through rate very much less than the domestic rate from the same port of entry to the same destination. In a commercial sense of course the foreign article is carried under unlike circumstances and conditions; and this has been held by the Supreme Court to justify or permit import rates lower than domestic rates. Incidentally it may be noticed that the practical result of this ruling is at variance with our tariff policy and that in particular instances the difference in favor of the imported article may defeat the purpose of protective duties. However that may be, the act as construed in this regard, like the construction of the long and short haul clause, contains no practical restraint upon discriminations of this class, and this defect in the substantive law, if it be deemed a defect, cannot be obviated by changes in administrative methods or authority.

The same observations may be made in respect of many other matters which now give rise to well-founded complaints of discrimination, such as private car lines, terminal roads, elevators and the like. Some of these matters, at least under given circumstances, may be within the scope of the present law. Others are not embraced within its terms or are claimed by the carriers to be unaffected by its provisions. Until this claim has been passed upon by the court of last resort, which means protracted litigation, the discriminating effect of facilities and practices now unregulated must be suffered to continue. If some requirement or prohibition suited to the nature of the case is not embodied in the regulating statute the exempt transaction, however unjust or injurious, will remain a law-

ful exercise of the carrier's volition and so beyond the jurisdiction of courts or commissions. Only that which the statute enjoins can be required; only that which it makes unlawful can be prevented.

Thus it appears, if I am not mistaken, that in some important respects the foundation of the act of 1887 is badly constructed or incomplete to a degree not always appreciated. The partial failure of that act to accomplish its beneficent purpose arises mainly, as I conceive, not because the administration of the law has been lax or incompetent, nor altogether because judicial declaration has deprived the commission of authority over rates which it was originally supposed to possess, but because the substantive provisions of the statute do not provide the necessary groundwork for more successful effort. While I firmly believe that the powers of the commission should be enlarged, I also believe that it is even more essential to extend and recast the enacted rules of conduct and thereby provide the basis of effective control. It is for the Congress by its regulation to further enjoin, require, limit, restrict or forbid as may be needful or appropriate, and this is a matter which properly precedes the question of administration.

Tribunals of Regulation.

After the rules of conduct and standards of obligation to be observed by carriers have been determined and defined in the regulating statute, according as the Congress may determine, we come to the question of the agency and methods of administration. It is not now the extent or degree of authority to be exercised, but the kind of tribunal to perform the administrative duty. Shall the enforcement of the law be remitted to the federal courts or shall there be a commission to exercise legislative rather than judicial authority? In answering this question we must keep in mind the unlike and separable things to be accomplished by our scheme of regulation. As already stated, the only suitable means of securing the observance of published tariffs are criminal penalties for disregard or evasion, while the appropriate methods for bringing about such changes in those rates as justice may require are limited to civil proceedings. It is assumed that this distinction will be observed in framing the legislation and in every effort to give effect to its provisions.

Manifestly the criminal remedy can be applied only by the courts. In this respect there is no difference between a misdemeanor under the regulating statute and a misdemeanor under any other law. Both must be dealt with in the same way, and this implies in the one case as in the other a strictly judicial procedure. Therefore, all those provisions which are designed to prevent the payment of rebates and kindred practices, of whatever character or description, must be enforced by courts of proper jurisdiction, and can be enforced in no other way.

But when we consider the other field of administration, where authority is to be exercised not to secure conformity to the published standard of charges, but to change the standard itself when found unreasonable or relatively unjust, it seems plain to me that a judicial tribunal is neither suitable nor adequate. The fundamental objection to any proposal to devolve upon the courts the duty of regulating in this direction, that is, making required changes in tariff schedules, is that the questions involved are essentially legislative and not judicial. The thing to be done is not the appropriate subject of judicial determination. The courts cannot apply the requisite remedy. If the charge for a given service is fifty cents a hundred pounds and that charge is excessive, the needful change is the substitution of a lower charge for the future. This is distinctly a legislative function. The same may be said with equal certainty with reference to relative rates which discriminate between different localities or articles of traffic. The proper readjustment in such cases involves considerations which courts do not take into account, but which come within the broader range of legislative discretion. That the courts will not exercise jurisdiction to prescribe either absolute or relative rates appears to be plainly affirmed by the Supreme Court in the Reagan case, 154 U. S., 362, in the following language:

> "The courts are not authorized to revise or change the body of rates imposed by a legislature or commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work."

This distinction is tersely stated by Mr. Justice Brewer in the maximum rate case in these words:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

Undoubtedly the courts can and will under statutory authority, and to an important extent without it, exercise such jurisdiction as will indirectly affect rates for the future, but they cannot and will not undertake to prescribe the schedule which shall take the place of one found excessive or unfairly adjusted. They can prevent the administrative encroachment of constitutional rights, but they cannot be authorized to correct the injustice of an unreasonable or preferential rate by substituting a just and reasonable standard of charges. At best and at most the control of rates by judicial action is an indirect, uncertain and limited scheme of regulation. If that plan is adopted it is quite certain that we must enter upon a long litigation to find out how much the courts can do, how much they will do and how they will do it.

Broadly speaking, the judicial machinery is provided to punish those who violate criminal laws and to decide private as distinguished from public controversies. A tariff rate which is too high or which unduly discriminates does not constitute an individual grievance merely, but affects every person who may be required to pay that rate for a transportation service. The continuance of an unjust rate or its correction is a matter of public concern, and matters of public concern, apart from the enforcement of criminal laws, are ordinarily the appropriate subject not of judicial but of legislative determination.

The notion may be far-fetched and will doubtless be combatted, but I am disposed to regard a tariff rate which has been legally established as analogous to a civil law. It answers to the broad definition of such a law because it is in effect a rule of conduct which measures the obligation of shipper and carrier alike. As a practical matter so far as the public is concerned, it does not seem to me to very much matter whether a given rate is established by the voluntary action of the carrier, by the exercise of public authority in the first instance, or by direct legislation. In either case it fixes with substantially the force of an enactment the price at which public carriage can be obtained. If that rate is departed from by any sort of forbidden preference or concession, a condition exists which

seems to me exactly like the violation of a criminal statute, as is now the case, and courts are constituted to prevent and punish such transgressions. But if the rate is itself wrong, no matter how it came to be in force, if its application produces actual or relative injustice, a condition exists which is altogether similar to an unwise or oppressive act of legislation that ought to be amended or repealed.

If rates were established, as they might be, by direct legislation, it would be manifestly absurd, assuming they were not confiscatory, to provide for their alteration by resort to the courts. The appeal in such case would be to the legislature as the only source of relief. Likewise, if rates were fixed in the first instance by public authority, as is done in several states, the courts could not interfere except to protect constitutional rights. It seems plain to me that in such cases there could be ordinarily no question for judicial cognizance. Now, how does the way in which a given rate was originally imposed affect the nature of the appropriate tribunal of regulation? If rates fixed in the first instance by the legislature or by a commission with delegated powers could not be the subject of judicial inquiry, why is it that rates established by the carriers themselves should be subjected only to judicial investigation and control?

In a certain sense and for certain purposes the reasonableness of a transportation charge presents a judicial question. Such a question arises when a rate has been paid which is claimed to be unreasonable and suit is brought to recover the excess. But a rate may be claimed to be excessive from the standpoint of the public, without regard to any instance of individual hardship, and that rate presents a legislative question. It does not follow, therefore, even if rate control goes no further than to require the discontinuance of unreasonable charges without undertaking to prescribe for the future, that a legislative tribunal is not the proper one to determine the controversy. The circumstance that courts may in some cases and to some extent consider and decide such questions is not at all inconsistent with the idea that they are essentially legislative.

The view I take and the distinction I draw may be indicated by an example. The present grain rate from Chicago to New York, established by the carriers, is 17½ cents per hundred pounds. Now, I do not believe it would be possible by competent evidence in a judicial proceeding to prove that this rate is unreasonable. On the

other hand, if public authority should fix that rate at 15 cents—the rate recently in force—either by direct legislation or through a commission, I do not believe it possible for the carriers to prove by competent evidence that 15 cents would be confiscatory or in any way encroach upon their constitutional rights. Between these two rates there is a margin of two and a half cents which may be said to measure the sphere of legislative discretion. The courts might decide in a case within their jurisdiction that a given rate is not unreasonably high, but it does not follow that a lower rate on the same article imposed by public authority would be adjudged unreasonably low and therefore be restrained. In other words, a rate which the courts would not condemn in a suit to recover damages nor enjoin as the result of judicial inquiry, if that could be done, may be a higher rate in given circumstances than the public ought to be required to pay, just as a rate imposed upon the carrier which the courts would not condemn as confiscatory or for any other reason may be lower than the carrier should be permitted to charge.

It is both true and right that courts, generally speaking, decide the cases that come before them upon the legal evidence submitted and in accordance with settled principles of jurisprudence, and do not, as a rule, directly, if at all, take into account the economic consequence of their decisions. On the other hand, the legislature in determining whether existing rules of conduct shall be changed or new rules adopted is not controlled by evidence or by judicial precedent, but acts presumably upon the broadest considerations of public welfare. It is not too much to say that every controversy involving the adjustment of freight rates presents an economic problem whose solution should be determined with the view of promoting the largest public advantage consistent with the just rights of the carrier. The courts decide questions of legal right; legislatures consider, when their action is governed by intelligence, the probable effect of their enactments upon all the interests likely to be affected. These comments have reference to the distinct nature of the judicial function as distinguished from the legislative function. It is further to be observed that a scheme of rate regulation by the courts would doubtless be held unconstitutional, as numerous decisions affirm and as pointed out in the lucid opinion furnished by Attorney-General Moody to the Senate Committee. Therefore, from whatever point of view this matter is observed, it seems plain

to me that the questions here referred to are distinctly legislative questions and that the proper tribunal of regulation, whether its authority be greater or less, is legislative and not judicial.

Administrative Authority.

Having provided the needful code of substantive law and decided that it shall be administered by a commission and not by a court, so far as the regulation of rates is concerned, the next thing to determine is the measure of authority which the administrative body shall be permitted or required to exercise. Under the present law, as it has been interpreted, the commission cannot in any case determine what rate shall be observed in the future. It can only decide whether the charges fixed by the carriers conform to the standard of reasonableness and relative justice, and if found otherwise, direct their discontinuance. Whether the law shall be so amended as to authorize the commission, after investigating a complaint upon notice and opportunity to be heard, to prescribe the future rate in that case, if the complaint is well founded, is the stoutly controverted question. I do not undertake to discuss this question for I can add nothing to what has already been said. Besides, the purpose of this paper is to outline certain principles of regulation rather than to argue for an increase of official authority. I am firmly convinced that the agency entrusted with the enforcement of such rules of conduct as may be enacted in relation to rates should be a commission and not a court, whether the authority devolved upon the regulating tribunal be limited to the present or extend into the future. I realize that the power to decide, even in contested cases and subject to judicial review—which is all that is proposed and even more—what rates shall be charged in the future is a very important power and involves grave responsibility. Personally, as a member of the commission, I do not covet the exercise of that power and should welcome some other adequate solution of the question at issue; but how can any other plan be relied upon to provide proper and sufficient control over railroad rates and practices? The argument for denying such control virtually admits, as it seems to me, that the freedom of the carriers to make such obtainable rates as they may deem for their interest is not to be materially abridged. However far-reaching may be the proposal to invest a

commission in any case with actual authority over future rates, is not the denial of that authority, to be exercised by a legislative tribunal, a far more serious proposition?

Effect of Administrative Action.

One further observation. If an administrative tribunal rather than a court is the selected agency for enforcing the enacted rules of conduct in respect of rates, whatever be the extent or degree of its authority, the orders which it is empowered to make should be self-enforceable and not as now only *prima facie* findings for the purpose of legal proceedings. It is not sufficient or suitable that the administrative body charged with the duty of giving effect to the regulating statute, and exercising such authority as the Congress may confer, should be obliged, when its directions are disregarded, to become a suitor in the courts to enforce its own determinations. When the commission has investigated and decided, when it has promulgated such an order as it may be authorized to make, its duty in the premises should be fully discharged and ended. Subject to such judicial review as will protect against the abuse or unreasonable exercise of delegated authority, the lawful directions of the regulating tribunal, unless restrained or set aside by the courts, should take effect and be obligatory substantially the same as legislative enactments. Whether it be deemed sufficient to provide only for condemnation and orders of desistence, or whether in addition authority be bestowed to prescribe for the future, however much or little the power with which administration is invested, the legislation should be so framed as to compel the carrier to comply with an authorized requirement or to resort to the courts for its suspension or annulment.

Therefore, as I conceive, the problem of enacting or amending laws for the regulation of interstate carriers includes the four elements which I have thus briefly described. To my mind they are quite distinct and separable as I have endeavored to explain. Each presents its peculiar phases and furnishes its special field of controversy. The task of legislating upon this subject is difficult and the need urgent. It cannot be doubted that a correct analysis and clear apprehension of the principles involved will aid a wise and useful outcome.